Filed 3/20/19 Gordon v. Roth CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

STEVEN GORDON, et al., Plaintiffs and Appellants, v. JONATHAN ROTH, Defendant and Respondent.	B289000 (Los Angeles County Super. Ct. No. BC675182) **ORDER DENYING REHEARING AND MODIFYING OPINION [NO CHANGE IN JUDGMENT]**

THE COURT:

Plaintiff Steven Gordon's petition for rehearing is denied. The opinion filed on February 21, 2019 is modified as follows:

On page 3, the second paragraph, line 1: delete "Gordon's" and replace it with "Roth's."

There is no change in the judgment.

WILLHITE, Acting P.J. COLLINS, J. CURREY, J.

Filed 2/21/19 Gordon v. Roth CA2/4 (unmodified opinion)

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STEVEN GORDON, et al., Plaintiffs and Appellants, v. JONATHAN ROTH, Defendant and Respondent.	B289000 (Los Angeles County Super. Ct. No. BC675182)

APPEAL from a judgment of the Superior Court of Los Angeles County. Samantha P. Jessner, Judge. Affirmed.

Weiss & Zaman, Thomas J. Weiss, Shawn Zaman for Plaintiffs and Appellants.

Scheper Kim & Harris, William H. Forman, Gregory A. Ellis for Respondent.

Steven Gordon and Jonathan Roth entered into a Memorandum of Understanding concerning the formation of a joint venture to identify and manage real estate investments and other business opportunities. After Roth located a real estate opportunity, however, he informed Gordon that it would not be part of the joint venture. Gordon and his business associate and partner, Robert Ormond, then commenced this action based on contract and tort theories. On Roth's demurrer to their first amended complaint, the trial court determined the MOU was unenforceable because its terms were too uncertain and it constituted only an "agreement to agree." The court therefore entered judgment in favor of Roth. This appeal followed. We agree Gordon and Osmond ("Appellants") failed to state any claims and affirm the judgment.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Facts Alleged in the First Amended Complaint.

Appellants commenced this action on September 11, 2017. After Roth successfully demurred to the initial complaint, they filed their first amended complaint. In it they alleged the following facts, which we assume to be true when reviewing the judgment of dismissal following the demurrer. (*Moore v. Regents of University of California* (1990) 51 Cal. 3d 120, 125.)

Gordon is a successful real estate developer with offices in a prestige building in Beverly Hills. He founded the real estate firm Domino Realty Management Company and has been active for over 30 years in the acquisition and management of high-end residential and commercial properties. Ormond has been Gordon's business associate and partner in various ventures.

Roth is the former president of Canyon Partners Realty Advisors, a real estate equity investment and management company in Beverly Hills. After leaving that firm in September 2015, Roth sought to shore up his contacts within the real estate equity and debt industry. Roth approached Gordon, suggesting they form a joint venture. Gordon would provide Roth with a platform (office space and support staff) to prospect for real estate opportunities. Gordon believed his office was an ideal location for Roth to seek business opportunities and project an image of credibility and continuity to the real estate industry.

To that end, Gordon's counsel prepared a MOU dated April 26, 2016, to set forth their agreement. The preamble provided:

"The purpose of this Memorandum of Understanding ('MOU') is to set forth the intentions of Steven Gordon ('Gordon') and Jonathan P. Roth ('Roth') with respect to the formation of a joint venture between Gordon and Roth for the purpose of creating a platform ('Newco') to identify and manage investments in real estate, debt secured by real estate, operating companies, and in such other opportunities as the Domino Parties (as defined below) and Roth may mutually decide from time to time."

Appellants principally rely on paragraphs 1, 3, 6 and 9 as the basis for their contentions that the MOU was a binding agreement and that Roth breached its terms. Those paragraphs provide as follows:

"1. Within a reasonable period of time, the parties shall form Newco, which shall be a newly created Delaware limited liability company (or such other legal structure mutually agreed by them), to be owned (directly or indirectly) 35% by Gordon, 25% by Robert Ormond (together with Gordon, the 'Domino Parties') and 40% by Roth. The Domino Parties and Roth shall mutually agree

upon a name for Newco. The detailed terms and conditions of Newco shall be set forth in the limited liability operating company agreement (or equivalent agreement) of Newco. . . .

"3. Whenever Newco finds an investment opportunity acceptable to the Domino Parties and Roth, Newco shall form a wholly owned entity to own and hold such investment (each, a 'Project Entity'). The ownership of each Project Entity shall be mutually and reasonably agreed upon by the Domino Parties and Roth. Each Project Entity shall be directly or indirectly controlled or otherwise managed by Newco, and all management fees, other fee income, carried interest, promote or other similar amounts payable by such Project Entity shall be paid to Newco unless otherwise mutually agreed by the Domino Parties and Roth.

"6. Each of the Domino Parties and Roth shall present to Newco all investment and other business opportunities that fall within Newco's scope, including all real-estate-related endeavors that may give rise to management fees, other fee income, carried interest, promote or other similar amounts. It is the intention of the Domino Parties and Roth for Newco to be the exclusive vehicle through which such opportunities are pursued and for each of them to not pursue such opportunities separately, except as mutually agreed by the Domino Parties and Roth. In determining whether Newco should pursue or pass on any opportunity, in determining the manner in which any such opportunity is pursued by Newco, in determining the ownership of the Project Entity through which such opportunity is pursued, and in otherwise acting with respect to Newco, each of the Domino Parties and Roth shall act reasonably, in good faith and in the best interests of Newco with the goal of maximizing the long-term success of Newco for their mutual benefit.

"9. This MOU represents a binding commitment for both Gordon and Roth to use good faith efforts to seek to establish Newco pursuant to the parameters set forth above."

Beginning April 28, 2016, Roth engaged in negotiations with an entity known as Grass River Property LLC and its affiliated entities (collectively "Grass River"). Grass River engaged in real estate development and financing in Florida. In February 2017, Grass River Credit, LLC (GRC) was formed as a Florida limited liability company. Gordon believed GRC was formed for the purpose of initiating, funding, and servicing secured real estate loans. During 2016 and through July 21, 2017, Gordon was unaware of the full extent and nature of contacts and negotiations between GRC and Roth because Roth did not keep him informed.

From time to time, Roth assured Gordon that he was working on projects for the benefit of the joint venture. Roth provided Gordon with materials detailing the business model of the Grass River entities, and gave him a promotional circular. The circular described the proposed terms of investment in Grass River, and set a target of $500 million, with a minimum $25 million commitment. Based upon these materials, Gordon continued to provide Roth with office space and support staff.

In early July 2017, Roth sent a text message to Gordon stating, "We just closed! $255 million. Thanks for all of your support." Gordon responded, "Excellent[. W]hat's next? Congratulations." Roth texted back, "Thiel, Bass and putting the money to work. Enjoy Aspen." Thiel and Bass are wealthy individuals and were prospective investors in Grass River. Gordon asserted that Roth, by his conduct, was identifying the Grass River opportunity as a joint venture project.

On July 21, 2017, Roth informed Gordon that Roth had finalized his deal with the Grass River entities. Gordon responded that he welcomed the news and the parties should address formation of an entity and implement the equity division called for by the MOU. Roth then informed Gordon that he and Ormond would not be entitled to share in the Grass River opportunity because Grass River was outside the scope of the MOU. Gordon told Roth to immediately vacate Gordon's offices.

Gordon advised Roth that he and Ormond were asserting claims against Roth for breach of duties under the MOU and fraud. Roth asserted he had no obligations under the MOU and no joint venture existed. During the 16 months Roth occupied Gordon's offices, Gordon did not receive, nor did he request, payment for rent or staff salaries. Gordon asserted that Roth caused GRC to be dissolved in August 2017, in order to thwart Appellants' claims. Roth tendered a check for $164,000 to Gordon on August 7, 2017, based on Roth's computation of the value of the office space and support staff provided to him.

B. Proceedings in the Trial Court.

Appellant's first amended complaint asserts claims for (1) breach of contract, (2) intentional breach of fiduciary duty, (3) constructive fraud by a fiduciary, (4) declaratory relief, (5) breach of the covenant of the agreement to use best efforts to implement the joint venture, (6) deceit, and (7) common count (value of goods and services).

Appellants sought contract and tort damages of at least $30 million based on Roth's alleged breach of contract and breach of fiduciary duty. In the alternative, they sought specific performance of the MOU, with Appellants receiving a constructive trust on 60 percent of Roth's equity interest in the Grass River

entities. Appellants' declaratory relief claim further sought a declaration that the Grass River opportunity was within the scope of the MOU, the failure to form Newco was a nonessential ministerial act, and the failure to form Newco was entirely Roth's fault. They alleged Roth failed to act in good faith pursuant to *Copeland v. Baskin Robbins USA* (2002) 96 Cal.App.4th 1251 (*Baskin Robbins*) to use "best efforts" to complete the formation of Newco in violation of paragraphs 1, 3, 6 and 9 of the MOU. Appellants also sought $400,000 as fair value of the office space and support staff they provided to Roth both as reliance damages and under the common count claim.

Roth demurred to the First Amended Complaint, principally arguing that neither the parties' conduct nor the MOU created a joint venture. He contended formation of Newco was a condition precedent to the maturation of Roth's obligations under the MOU; expectation damages were improper under the MOU; Gordon was not entitled to reliance damages because Domino Realty was the owner of the office space; the common count failed because it could not allege an implied promise to pay for the office space and support staff; and Ormond's claim failed because he was not a party to the MOU.

Roth filed a motion to strike Gordon's damages allegations, and requested judicial notice of Gordon's interrogatory responses in which Gordon admitted Domino had paid Roth's office expenses, and the MOU was not ambiguous.[1]

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[1] Roth also sought judicial notice of the trial court's order sustaining his demurrer to the original complaint, as well as a redlined version of the FAC showing the changes from the original complaint.

Appellants' opposition argued the parties' conduct (i.e., Roth's provision of information on Grass River to Gordon) supplied a sufficient basis for implying a joint venture; the formation of Newco was not a prerequisite to the existence of a joint venture; Roth breached his fiduciary obligations as a joint venturer by failing to present the Grass River opportunity to plaintiffs; the common count was based on the value of the office space and support staff, which was not a gift; and Ormond had standing as a third-party beneficiary of the MOU. Appellants also requested judicial notice of interrogatory responses in which Roth admitted he owed Gordon $164,000 for the value of the office space and support staff.[2]

After granting Roth's requests for judicial notice of (1) Gordon's discovery responses pursuant to *Bounds v. Superior Court* (2014) 229 Cal.App.4th 468, and (2) the prior order on the demurrer, and after denying Appellants' request for judicial notice, the trial court sustained the demurrer without leave to amend as to all causes of action.[3] The court found, contrary to Appellants' assertion, failure of the parties to form Newco was fatal because "[e]very purported obligation in the MOU is dependent upon the formation of a mutually agreed upon entity of some legal structure." Further, "on the specific issue of ownership of any

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[2] Appellants also sought judicial notice of several letters between the parties' counsel, Gordon's responses to Roth's discovery requests, and a copy of Roth's check for $164,000.

[3] Although the court sustained Roth's demurrer to the fifth cause of action (breach of the "best efforts" covenant) without prejudice as to Ormond, the court later dismissed the entire complaint as to Ormand.

given opportunity, such as Grass River, the parties agreed to agree in the future, which is not enforceable as a matter of law."

The court rejected Appellants' argument that paragraph 9 of the MOU represented "a binding commitment for both Gordon and Roth to use good faith efforts to seek to establish Newco pursuant to the parameters set forth" in the MOU. Relying on *Baskin Robbins, supra,* 96 Cal.App.4th 1251, the court held that although the parties could make a binding commitment to negotiate an agreement, the failure to reach an agreement was not a breach of such a contract. The trial court rejected Gordon's claim for damages for the provision of services and facilities to Roth because Gordon was not the real party in interest under Code of Civil Procedure section 367.[4] Gordon admitted in his interrogatory responses that Domino Realty had in fact provided the goods and services. After finding the motion to strike moot, the court entered judgment against Appellants.

DISCUSSION

Appellants argue the MOU and the parties' conduct created a joint venture giving rise to fiduciary duties that were breached when Roth failed to tender the Grass River opportunity to the joint venture. Contrary to the trial court's conclusion, they assert the formation of "Newco" was not a necessary precondition to establishment of the joint venture. Appellants further contend they were entitled to damages under *Baskin Robbins, supra,* 96 Cal.App.4th 1251, based on Roth's failure to negotiate in good faith. They note the First Amended Complaint could have been

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[4] Code of Civil Procedure section 367 provides, "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute."

amended to add Domino Realty as a party. Finally, they assert the trial court erred in granting judicial notice of Roth's documents.

I. STANDARD OF REVIEW.

We first review the complaint de novo to determine whether the complaint alleges facts sufficient to state a cause of action under any legal theory or to determine whether the trial court erroneously sustained the demurrer as a matter of law. (*Thompson v. Ioane* (2017) 11 Cal.App.5th 1180, 1190; *Cantu v. Resolution Trust Corp*.(1992) 4 Cal.App.4th 857, 879.) We may consider matters that are judicially noticed. (*Professional Tax Appeal v. Kennedy-Wilson Holdings, Inc.* (2018) 29 Cal.App.5th 230, 234.) Second, we determine whether the trial court abused its discretion by sustaining the demurrer without leave to amend. (*Brown v. Ralphs Grocery Co.* (2018) 28 Cal.App.5th 824, 843.) Under both standards, Appellants have the burden of demonstrating the trial court erred. (*Ibid*.) An abuse of discretion is established when "there is a reasonable possibility the plaintiff could cure the defect with an amendment." (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

II. THE FIRST AMENDED COMPLAINT FAILS TO STATE ANY CLAIMS.

A. The MOU Is An Unenforceable "Agreement to Agree."

"A joint venture is an undertaking by two or more persons jointly to carry out a single enterprise for profit." (*James v. Herbert* (1957) 149 Cal.App.2d 741, 748.) A joint venture exists where there is an "agreement between the parties under which they have a community of interest, that is, joint interest, in a common business undertaking, an understanding as to the sharing of profits and losses, and a right of joint control." (*Holtz v. United*

Plumbing & Heating Co. (1957) 49 Cal.2d 501, 506–507.) Whether a joint venture exists in any situation depends on the parties' intentions. (*James v. Herbert, supra,* 149 Cal.App.2d 747–748.) Little formality is required to create a joint venture, and an agreement to form a joint venture will not be invalidated because it may be indefinite with respect to some of the details. (*Ibid.*)

If there was an agreement for a joint venture the parties are fiduciaries because joint venturers are fiduciaries. If the parties formed a joint venture, neither one would have had a right, while the joint venture existed, to acquire the property that is the subject of the joint venture to the exclusion of the others. (*James v. Herbert, supra,* 149 Cal.App.2d 747–748.)

As the asserted joint venture is defined by a written contact, we also look to that contract to define the scope of the parties' obligations. The terms of a contract are reasonably certain only if they provide a basis for determining breach and fashioning a remedy. (*Weddington Productions Inc. v. Flick* (1998) 60 Cal.App.4th 793, 811 (*Weddington).*) "If, by contrast, a supposed 'contract' does not provide a basis for determining what obligations the parties have agreed to, and hence does not make possible a determination of whether those agreed obligations have been breached, there is no contract." (*Ibid.*)

"It is still the general rule that where any of the essential elements of a promise are reserved for the future agreement of both parties, no legal obligation arises 'until such future agreement is made.'" (*Baskin Robbins, supra,* 96 Cal.App.4th at p. 1256.) There is no remedy for the breach of an "agreement to agree." (*Ibid.*) Whether a term is essential depends on its relative importance to the parties and whether its absence from the

contract would make enforcing the contract unfair to any party. (*Baskin Robbins, supra,* 96 Cal.App.4th at p. 1256, fn. 3.)

When the material facts are undisputed regarding the existence of a contract, as they are here, whether the contract exists is a question of law. (*Bustamante v. Intuit, Inc.* (2006) 141 Cal.App.4th 199, 208.)

Appellants contend formation of Newco was not a precondition for the joint venture's existence, and the parties' conduct— i.e., Roth's use of the office space, and his communications with Gordon regarding Grass River—all establish a joint venture.

We disagree. First, even if the parties' conduct otherwise established a joint venture, they failed to create Newco, the vehicle through which the joint venture's real estate investment opportunities would be administered (pursuant to a separate agreement for each opportunity); as a result, they failed to satisfy this condition. (*Pfeifer v. Countrywide Home Loans, Inc.* (2012) 211 Cal.App.4th 1250, 1267 [a condition precedent is either an act of a party that must be performed or an uncertain event that must happen before the contractual right accrues or the contractual duty arises].)

Further, even if the parties had created Newco, or its formation was immaterial, the MOU is still fatally indefinite regarding the project entities. The joint venture was defined and to be enforced pursuant to the MOU. Paragraph 3 provides that each separate business opportunity required its own operating entity contract to set forth the terms of the parties' agreement with respect to that opportunity. Those terms were left open, as the MOU's language makes clear: "The ownership of each Project Entity shall be mutually and reasonably agreed upon by the

Domino Parties and Roth. Each Project Entity shall be directly or indirectly controlled or otherwise managed by Newco, and all management fees, other fee income, carried interest, promote or other similar amounts payable by such Project Entity shall be paid to Newco unless otherwise mutually agreed by the Domino Parties and Roth."

This language provides no basis to determine each party's interest in the business opportunity, or Newco's share. For that reason, it is impossible to fashion a remedy for Roth's failure to offer the Grass River opportunity to the joint venture because the parties never defined the terms governing that opportunity. Appellants cannot rely on the 60/40 percent allocation under paragraph 1 of the MOU because that allocation, by its terms, applies only to the umbrella entity "Newco," and does not apply to any of the operating entities. Because the MOU did not define the parties' obligations concerning the Grass River opportunity, no joint venture contract was formed with respect to it. Roth therefore cannot be in breach of any contractual provision or fiduciary duty arising under the alleged joint venture for his failure to present the opportunity to Appellants.

On this basis, *Holmes v. Lerner* (1999) 74 Cal.App.4th 442, upon which Appellants rely, is distinguishable. In *Holmes,* the parties orally agreed to form a partnership, but did not specify how profits were to be divided. (*Id* at p. 453.) The defendant contended this omission was fatal to partnership formation, but *Holmes* found a partnership existed, relying on the statutory definition of a partnership in Corp. Code, § 16100. That statute defines a partnership as "the association of two or more persons, for the purpose of carrying on business together, and dividing profits between them." (*Id.* at p. 453, emphasis omitted.) *Holmes* pointed

out the salient feature showing the existence of a partnership is the agreement to conduct a business together, while the mode of profit sharing could be left to further agreement of the parties. (*Id.* at p. 454.) Here, on the other hand, Appellants cannot rely on a statutory definition because the MOU expressly provides the mode of profit sharing was contractually left to the further agreement of the parties.

B. Gordon Cannot Recover Reliance Damages Under *Baskin Robbins*.

Gordon asserts the trial court erred in relying on his interrogatory responses that Domino Realty owns the office space. To establish he is the proper party, Gordon relies on the language in the MOU at paragraph 5 that Gordon would supply space at the Beverly Hills office, "a property owned and controlled by Gordon." As a result, he contends he is the real party in interest and he claims entitlement to reliance damages under *Baskin Robbins, supra,* 96 Cal.App.4th 1251, based on paragraph 9 of the MOU, which provides that the parties will use their best efforts to establish Newco.

We need not decide whether Gordon has standing to assert a claim for reliance damages because the MOU's best efforts language does not establish it was an agreement to negotiate under *Baskin Robbins, supra,* 96 Cal.App.4th at p. 1257. *Baskin Robbins* held that where the parties agree to bargain in good faith to reach an agreement, "[f]ailure to agree is not, itself, a breach of the contract to negotiate. A party will be liable [for reliance damages] only if a failure to reach ultimate agreement resulted from a breach of that party's obligation to negotiate or to negotiate in good faith." (*Baskin Robbins, supra,* 96 Cal.App.4th at p. 1257.)

Here, under paragraph 9, the parties agreed to use their best efforts to form Newco, not to negotiate its terms. Further, with respect to both Newco and the project entities to be formed, the parties intended to reach an agreement, rather than merely negotiate, regarding the terms of each. With respect to Newco, as noted above, paragraph 1 states "The detailed terms and conditions of Newco shall be set forth in the [as yet unnegotiated] limited liability operating company agreement (or equivalent agreement) of Newco." With respect to the project entities, paragraph 3 states, as also noted above, "Whenever Newco finds an investment opportunity acceptable to the Domino Parties and Roth, Newco shall form a wholly owned entity to own and hold such investment. . . . The ownership of each Project Entity shall be mutually and reasonably *agreed upon* by the Domino Parties and Roth." (MOU, ¶3, emphasis added.) "As one early case explained it, it is impossible for the law to affix any obligation to a promise to agree ""[s]ince either party by the very terms of the promise may refuse to agree to anything to which the other party will agree[.]"" (*Baskin Robbins, supra,* 96 Cal.App.4th at p. 1257, fn. 10.)

As we conclude that Gordon (and by implication Domino Realty) was not entitled to reliance damages, we need not consider the issue of the correct party plaintiff under Code of Civil Procedure section 367. Additionally, because the judicially noticed documents related solely to that issue, we need not consider the propriety of the trial court's judicial notice rulings or Appellant's assertion that the judicially noticed documents created an impermissible speaking demurrer.

DISPOSITION

The judgment of the Superior Court is affirmed. Respondent is to recover his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CURREY, J.

We concur:

WHILHITE, Acting P.J.

COLLINS, J.